SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 25 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 173

GEORGE M. CHAIKIN,
Petitioner

v.

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 66, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, George M. Chaikin, petitions that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit (R. 50,[1] Appendix A, *infra*), affirming an order of the United States District Court for the Eastern District of New York vacating a preliminary injunction against the induction of petitioner into the armed forces and dismissing the complaint.

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[1] The proceedings in the District Court are cited by document number, followed where appropriate by the page number of the document referred to. The proceedings in the Court of Appeals are cited by page number.

OPINION BELOW

The Court of Appeals wrote no opinion, and the District Court wrote none in vacating the preliminary injunction and dismissing the complaint. The findings and opinion of the District Court in granting the preliminary injunction (R. 7), not reported, are set forth in Appendix B, *infra*.

JURISDICTION

The order of the Court of Appeals (R. 50, Appendix A, *infra*) is dated and was entered March 12, 1969. Jurisdiction is conferred on the Court by 28 U.S.C. 1254.

QUESTIONS PRESENTED

Respondent, Selective Service System Local Board No. 66 (the "Board"), revoked petitioner's student deferment, reclassified him from II-S to I-A, and ordered him to report for induction as a delinquent because of his failure to maintain possession of his registration certificate. The questions presented are:

1. Whether section 10(b)(3) of the Military Selective Service Act of 1967 (the "Act"), 50 U.S.C. App. 460(b)(3), deprived the District Court of jurisdiction to enjoin petitioner's reclassification and induction and, if so, whether that section is constitutional.

2. Whether the actions of the Board in reclassifying petitioner and ordering him to report for induction, and the Selective Service System regulations pursuant to which these actions were taken, are authorized by the Act.

3. If question 2 is answered in the affirmative, whether the actions of the Board and the Selective Service System regulations which authorized them are constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 6(h)(1) of the Act, 50 U.S.C. App. 456(h)(1) provides in part as follows:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full time course of instruction at a college, university or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. * * * As used in this sub-section, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Section 10(b)(3) of the Act, 50 U.S.C. App. 460(b)(3), provides in part as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *

Section 12(b) of the Act, 50 U.S.C. App. 462(b) provides in part as follows:

> Any person * * * (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to

> the issuance, transfer, or possession of such [registration] certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. * * *

Section 1617.1 of the Selective Service System regulations, 32 C.F.R. 1617.1, provides in part as follows:

> Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board * * *

Section 1642.4(a) of the Selective Service System Regulations, 32 C.F.R. 1642.4(a), provides as follows:

> Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT OF THE CASE

This case involves the Selective Service System's delinquency reclassification procedures for failure to maintain possession of a registration certificate which were before the Court in *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233. *Oestereich* ruled that the delinquency reclassification and induction of a theological student, exempted from service by section 6(g) of the Act, is unauthorized by the Act and may be enjoined notwithstanding the limitations of section 10(b)(3) on pre-induction judicial review. The central issue which this case presents is whether *Oestereich* requires a similar result in the case of a full-time college student who has been deferred from service under section 6(h)(1). The same issue is presented by the

petition for certiorari in *Breen v. Selective Service Local Board No. 16*, No. 1144, this Term.[2]

The relevant facts, alleged in the complaint (R. 1), are admitted by the motion to dismiss (R. 13). Petitioner, a Selective Service registrant, was classified II-S in November, 1967, and has maintained the status prescribed for that classification ever since.[3] On March 28, 1968, he received a notice from the Board declaring him a delinquent for "failure to maintain your Selective Service Registration Certificate." Two weeks later, he received a notice from the Board reclassifying him I-A. On July 30, 1968, following the denial of an appeal from his reclassification, petitioner received a notice to report for induction on August 13, 1968. (R. 1-1, 2.)

On August 6, 1968, petitioner filed his complaint challenging the actions of the Board in reclassifying him and ordering him to report for induction, and the Selective Service System regulations under which the Board acted, as unauthorized by the Act and contrary to law. The complaint further alleged that the Service's delinquency regulations, as applied, violate the First Amendment, due process, the Sixth Amendment and the prohibition against bills of attainder. Petitioner sought an injunction against his induction and a declaratory judgment invalidating his reclassification. (R. 1-2, 3, 4.)[4]

On August 12, 1968, the District Court (Judd, J.) issued a preliminary injunction against petitioner's induction (R. 6). On February 17, 1969, following the decision of the Second Circuit in *Breen, supra*, that section 10(b)(3) bars

[2] In the words of the government (R. 14-7), *Breen* is "exactly like" the present case.

[3] At the time of the commencement of the action, petitioner had completed the fourth year of a five year course of study in architecture at Cooper Union (R. 2-3). He is now in the fifth year of that course.

[4] Jurisdiction was invoked under 28 U.S.C. 1331 and 2201, and the existence of the requisite jurisdictional amount was alleged (R. 1-1).

pre-induction judicial review in the circumstances of this case,[5] the District Court (Bartels, J.) granted the government's motion to vacate the preliminary injunction and dismiss the complaint for want of jurisdiction (R. 16).

On March 12, 1969, the Court of Appeals, after hearing argument on petitioner's motion for a stay of his induction pending appeal (R. 19), entered an order (1) affirming the order of the District Court on the authority of *Breen*, (2) staying the mandate pending petitioner's application for certiorari, and (3) staying petitioner's induction pending issuance of the mandate or the denial of certiorari in *Breen* (R. 50, Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision below, and the decision in *Breen* on which the court below relied, are in conflict with this Court's decision in *Oestereich*. The rule of the latter, as stated in *Clark v. Gabriel*, 393 U.S. 256, 258, is that induction may be enjoined where "the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with [his] rights explicitly established by statute and not dependent on an act of judgment by the Board."

The circumstances of the present case satisfy all three of these criteria.

First, the right to deferment of a college student satisfactorily pursuing a full-time course of study is "explicitly established" by section 6(h)(1) of the Act, and may be restricted only upon a finding by the President that the needs of the armed forces so require. No such finding has been made. Second, since petitioner admittedly qualifies for deferment under section 6(h)(1) (*supra*, p. 5), his deferment is "not dependent on any act of judgment by the Board." Finally, the delinquency procedure by which

[5] The majority and dissenting opinions in *Breen*, not yet reported, appear at pp. 27-41 of the petition for certiorari in that case.

petitioner was reclassified has no more "statutory basis" in the case of a student deferment than it has in the case of a theological exemption. The Solicitor General conceded as much in his brief in *Oestereich*, No. 46, this Term, where he stated (p. 54, emphasis supplied):

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt *or deferred* or whatever."

Judge Feinberg, dissenting in *Breen*, was plainly correct, therefore, when he concluded that "this case is governed by the reasoning in *Oestereich*."

2. The decisions of the Second Circuit in the present case and in *Breen*, if not patently in conflict with *Oestereich*, present an important question which the Court should settle.

These two cases are the only ones in which a Court of Appeals has considered the application of *Oestereich* to student deferments under section 6(h)(1). Prior to *Oestereich*, two District Judges in the Second Circuit held that section 10(b)(3) of the Act does not preclude an injunction against the delinquency reclassification and induction of a registrant holding a student or an occupational deferment. *Kimball v. Selective Service Local Board No. 15*, 283 F. Supp. 606 (S.D.N.Y.); *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D. N.Y.).[6] Another District Court, in a decision subsequent to *Oestereich*, relied on it as authority for enjoining the reclas-

[6] *Kimball*, citing the Solicitor General's confession of error in *Oestereich*, concluded (at 608) that any distinction "between an 'exemption' under § 456(g) and a 'deferment' under § 456(h) is one without legal significance." *Faulkner* held section 10(b)(3) unconstitutional as applied to a delinquency reclassification resulting from the exercise of First Amendment rights in surrendering a registration certificate. The government's appeal from that decision, *Clifford v. Faulkner*, No. 825, this Term, has been withdrawn.

sification and induction of a student entitled, under section 6(i)(2), to a deferment until the end of the academic year. *Armendaris v. Hershey*, ___ F. Supp. ___ (W.D. Tex., Feb. 5, 1969).

Furthermore, the Eighth Circuit, while refusing on the authority of *Oestereich* and *Clark v. Gabriel, supra*, to enjoin the delinquency reclassification of a graduate student who had been given a discretionary deferment under section 6(h)(2), declined the government's invitation to endorse the decision in *Breen*. *Kolden v. Selective Service System Local Board No. 4*, ___ F.2d ___ (Jan. 28, 1969). The court stated (at n. 6, emphasis in original): "Since the question is not before us we refrain from expressing an opinion as to whether § 10(b)(3) bars judicial review of a board's reclassification of *undergraduate* students from II-S to I-A for becoming delinquent."

The differences revealed by the foregoing decisions and by Judge Feinberg's vigorous dissent in *Breen* should be settled by the Court. That this was the view of the panels of the court below which decided *Breen* and the present case appears from their actions staying the induction of both petitioners pending application for certiorari.

3. Because *Oestereich* was disposed of on grounds of statutory construction, the Court did not reach questions with respect to the constitutionality of section 10(b)(3) and of the Selective Service System's delinquency procedures. If it were held that *Oestereich* does not control the present case, consideration of these questions would be required. They include the questions suggested by the majority opinion in *Oestereich* (at 237) arising from the lack of statutory standards governing delinquency reclassifications; the questions outlined in Justice Harlan's concurring opinion in *Oestereich* (at 243-44, n. 6), and the First Amendment question flowing from the use of delinquency reclassification as a reprisal for political protest. All of these questions are substantial and important, as the Solicitor General acknowledged in his brief in *Oestereich* (at 47-48, 49, 56, 62).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Order Below

This cause coming on to be heard on motion of plaintiff-appellant for an order staying the issuance by the defendant-appellee, Selective Service System Local Board No. 66, of an order requiring the plaintiff to report for induction into the armed forces pending the disposition of plaintiff's appeal from the order of the United States District Court for the Eastern District of New York made and entered February 17, 1969, vacating the preliminary injunction theretofore issued and dismissing the complaint herein; and the Court having heard the arguments of counsel, and being fully advised in the premises, it is

ORDERED, that plaintiff's appeal from the order of the District Court of February 17, 1969, be and it is hereby docketed in this Court;

FURTHER ORDERED, that the aforesaid order of the District Court of February 17, 1969, be and it is hereby affirmed on the authority of the decision of this Court dated January 10, 1969, in *Breen v. Selective Service Local Board No. 16*, No. 32345;

FURTHER ORDERED, that the issuance of the mandate herein be and it is hereby stayed pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure pending application by plaintiff for certiorari;

FURTHER ORDERED, that the issuance by the defendant, Selective Service System Local Board No. 66 of an order requiring plaintiff to report for induction into the armed forces be and it is hereby stayed pending the issuance of the mandate herein; provided that the stay granted by this paragraph shall terminate in the event of the denial by the

Supreme Court of the United States of a petition for certiorari in *Breen v. Selective Service Local Board No. 16.*

Dated: New York, N.Y.
March 12, 1969.

/s/ J. Edward Lumbard

/s/ J. Joseph Smith

/s/ Edward C. McLean
Judges, U.S. Court of Appeals

APPENDIX B

Findings of Fact and Opinion of District Court Granting Preliminary Injunction

JUDD, J.

1. Plaintiff George Chaikin was duly registered under the Universal Military Training and Service Act and classified "II-S until October, 1968" in November, 1967.

2. Plaintiff is a student of architecture at Cooper Union where he has completed the fourth year of a five-year course of study. Plaintiff was married June 11, 1966.

3. Plaintiff Chaikin was registered with Selective Service Board No. 66 of Flushing, New York.

4. On March 26, 1968, the Board declared plaintiff delinquent for "failure to maintain your Selective Service Registration Certificate".

5. On April 12, 1968, the Board reclassified plaintiff from II-S to I-A.

6. On or about May 9, 1968 plaintiff filed a written notice of appeal from this reclassification. He was notified on July 17, 1968 that his appeal had been unanimously rejected.

7. On July 30, 1968, plaintiff received an order from the Board ordering him to report for induction on August 13, 1968.

8. Plaintiff contends that the Selective Service Regulations concerning delinquency (32 C.F.R. 1642.1 *et seq.*) are contrary to law, and violate his First Amendment rights. He now moves for an order enjoining the defendant Board from directing him to report for induction into the Armed Forces.

OPINION

This case, like *Brother Woods et al v. Selective Service Local Board No. 3* (68 C 350), raises questions of the validity of the delinquency declaration and reclassification procedures of local Selective Service Boards.

The opinion in the *Woods* case, decided by this Court August 12, 1968, points out that the issues in that case, as in this one, are similar to those presently before the United States Supreme Court in *Oestereich v. Selective Service Local Board No. 11* (*Certiorari* granted May 20, 1968); and that courts have assumed jurisdiction to enjoin an induction which is contrary to law, in spite of the provisions of the Section 10(b)(3) of the Universal Military Training and Service Act, e.g., *Kimball v. Selective Service Local Board No. 15*, 283 F. Supp. 606 (S.D.N.Y. 1968).

Issues will be presented at the trial as to the effect of the registrant's having reached age twenty-four and the effect of his marriage on the order of his induction.

Since the induction was imminent, a preliminary injunction was signed on August 12, 1968, subject to the filing of the foregoing findings of fact and opinion.

The defendants may, if they wish, move to vacate the injunction upon the Supreme Court decision in the *Oestereich* case.

Dated: Brooklyn, New York
August 13, 1968

/s/ Orin G. Judd
U. S. D. J.